No. 89-5120

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MICHAEL OWEN PERRY,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Louisiana

BRIEF FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AND THE AMERICAN MEDICAL ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This brief addresses the question whether the state court order directing that petitioner be involuntarily medicated for the purpose of restoring his competence to be executed is consistent with the Due Process Clause of the Fourteenth Amendment.

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INTEREST OF AMICI CURIAE

Founded in 1844, the American Psychiatric Association (APA) is the Nation's largest organization of physicians specializing in psychiatry. Approximately 35,000 of the Nation's psychiatrists are members. The APA has participated as *amicus curiae* in numerous cases involving mental health issues, including *Washington v. Harper*, 110 S. Ct. 1028 (1990), and *Ford v. Wainwright*, 477 U.S. 399 (1986). Because psychiatrists have the primary responsibility for providing psychiatric treatment, including prescribing and administering antipsychotic medication, to prisoners on death row, the order compelling such medication in this case greatly affects the concerns and work of the APA and its members. The

APA believes that its clinical experience, its scientific knowledge of psychiatric disorders and their treatment, and its work in psychiatric ethics can assist the Court in resolving the issues presented. Several of the APA's ethical principles, including the bar on psychiatrists' participation in an execution, are implicated by this case.

The American Medical Association (AMA) is a private, voluntary, nonprofit organization of physicians. The AMA was founded in 1846 to promote the science and art of medicine and the improvement of public health. Today, its membership exceeds 280,000 physicians and medical students. The AMA has filed numerous briefs in this Court in cases, such as this one, that raise serious issues of public health or medical ethics. One of the AMA's ethical opinions, Opinion 2.06, which precludes a physician from participating in a legally authorized execution, is directly relevant to the matter before the Court.[1]

STATEMENT

Petitioner Michael Perry, who has a long history of mental illness, suffers from schizoaffective disorder. Pet. App. 79, 133-34.[2] His symptoms include auditory hallucinations, paranoid thoughts, and disordered, delusional, and inconsistent thinking. *Id.* at 70, 77, 84. In the past, Perry has received psychotropic drugs, including haloperidol (otherwise known by its trade name, Haldol), as treatment for his illness. *Id.* at 50, 53.[3]

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[1] The parties have consented to the filing of this brief. Copies of their letters have been lodged with the Clerk.

[2] Schizoaffective disorder is characterized by the symptoms of both schizophrenia (*e.g.*, delusions, hallucinations, loosening of associations) and mood disorders (depressive or manic episodes). APA, *Diagnostic and Statistical Manual of Mental Disorders* 194, 208-10 (3d rev. ed. 1987).

[3] The terms "antipsychotic," "neuroleptic," and "psychotropic" are commonly used interchangeably to refer to medication used to treat thought disorders such as Perry's. *See Washington v. Harper*, 110 S. Ct. at 1032; R. Baldessarini, *Chemotherapy in Psychiatry*, ch. 2 (rev. ed. 1985). Other medications, such as antidepressants and lithium, treat mood rather than thought disorders. R. Baldessarini, *supra*, at ch. 3-4. Haldol, a tranquilizer and neuroleptic, is widely used by psychiatrists to manage the symptoms of thought disorders. *See Physician's Desk Reference* 1282-86 (44th ed. 1990).

Not surprisingly, Perry's mental condition was an issue throughout the criminal proceedings against him. Initially, two sanity commissions were convened to determine Perry's competence to stand trial. *State v. Perry*, 502 So.2d 543, 547 (La. 1986), *cert. denied*, 484 U.S. 872 (1987). The first commission, composed of two physicians and convened several months after Perry's arrest, recommended that he be transferred to a state facility for a complete psychiatric evaluation and for treatment. *Id.* at 547-48. The trial court accepted the recommendation. Eighteen months later, a second sanity commission, composed of three physicians, decided that Perry had become competent to stand trial. *Id.* at 548. Thereafter, although Perry had earlier entered a dual plea of not guilty and not guilty by reason of insanity to all five charges against him, he was permitted by the trial court, against the advice of counsel, to withdraw his dual plea and enter a simple plea of not guilty. *Id.* at 547, 550.

In 1985, Perry was convicted on five counts of murder and sentenced to death. The Supreme Court of Louisiana affirmed the conviction and sentence. *State v. Perry*, *supra*. Although the court rejected Perry's claims that he had not been competent either to stand trial or to withdraw his insanity plea, the Louisiana Supreme Court nonetheless suggested that a review of Perry's sanity prior to execution "might be in order." 502 So.2d at 564.[4] Accordingly, on January 21, 1988, the trial court

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[4] The court noted that Perry's counsel "may apply to the trial court for appointment of a sanity commission to make such a determination" and that the prosecutor or judge could *sua sponte* raise the issue of mental incompetence to be executed. 502 So.2d at 564.

appointed a sanity commission, composed of three psychiatrists and a clinical psychologist, to investigate Perry's "present sanity." Pet. App. 25; Pet. 5.

During the next nine months, the trial court held four separate hearings. At those hearings, the court received testimony and reports from commission members, Perry's medical records, and Perry's own videotaped testimony. Pet. 5, 7. Between April 20 and August 26, the trial court also received weekly reports on Perry's mental condition from the Louisiana Department of Public Safety and Corrections. Pet. 6.[5]

On October 21, 1988, the trial court issued its ruling. The court adopted the test for incompetence to be executed that Justice Powell articulated in *Ford v. Wainwright*. Pet. App. 50. *See* 477 U.S. at 422 (Powell, J., concurring in part and concurring in the result) (inmates are incompetent to be executed if they are "unaware of the punishment they are about to suffer and why they are to suffer it"). Applying that standard, the court found that Perry was "competent for execution . . . [but] only while maintained on psychotropic medication in the form of Haldol." Pet. App. 54. Although the court acknowledged that Perry had some right to refuse psychotropic medication (*id.* at 47), it concluded, without analysis, that "Louisiana's interest in the execution of [the] jury's verdict override[s] those rights of Mr. Perry" (*id.* at 56). Based on that conclusion, the court stated: "defendant's competency is achieved through the use of antitropic [*sic*] or antipsychotic drugs including Haldol and the Louisiana Department of Public Safety and Corrections is further ordered to maintain the defendant on the above medication as to be prescribed by the medical staff of said Department and if necessary to administer said medication forcibly to defendant and over his objection." *Id.* at 62.

[5] On August 26, the trial court issued an order requiring, among other things, that Louisiana prison authorities provide Perry with "psychiatric treatment and medication as deemed appropriate by the medical staff" until September 25. Pet. App. 30. Perry obtained a stay of the order of forcible medication from the Louisiana Supreme Court. *Ibid.*

The trial court stayed its order until the Louisiana Supreme Court could rule on any appeal. The Louisiana Supreme Court summarily declined to hear Perry's challenge. *State v. Perry*, 543 So.2d 487, *reh'g denied*, 545 So.2d 1049 (1989). The stay of the medication order is still in effect. Pet. 7.

SUMMARY OF ARGUMENT

The trial court's order, requiring petitioner to be medicated involuntarily for the sole purpose of restoring him to competence, violates the Due Process Clause of the Fourteenth Amendment. As this Court held in *Washington v. Harper*, 110 S. Ct. 1028 (1990), the substantive component of that clause protects a prisoner's liberty interest in avoiding unwanted psychotropic medication. In our view, a State cannot justify invasion of that interest when contrary to the prisoner's medical interests. At a minimum, however, the Due Process Clause must preclude a State from administering involuntary medication when it is *not only* contrary to the patient's medical interests *but also* unnecessary to treat a condition that poses a danger to others. This Court's decisions, lower court decisions, state statutes, and the vital state interest in preserving the ethical integrity and proper functioning of the medical profession uniformly attest to the insufficiency of any state interest in ordering psychotropic medication where, as here, neither a *parens patriae* nor a dangerousness justification is present.

Once it is recognized that the State cannot administer psychotropic drugs against an incompetent prisoner's will, and therefore cannot execute him (*Ford v. Wainwright*, 477 U.S. 399 (1986)), it is clear that neither can the State allow the prisoner to languish in a per-

manent psychotic state without running afoul of the Constitution. Any such indifference would violate the prisoner's Eighth Amendment right to needed medical treatment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). No state interest in waiting indefinitely for a possible natural restoration of competence (which is speculative) or in deterring feigned incompetence (which is not present here, and is generally detectable) can justify the State's denial of the constitutionally required treatment. Instead, the State must commute petitioner's sentence to life imprisonment and provide him with treatment.

ARGUMENT

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS A STATE FROM FORCIBLY MEDICATING A PRISONER SOLELY FOR THE PURPOSE OF RESTORING HIM TO COMPETENCE SO THAT HE MAY BE EXECUTED

The legal standards governing substantive due process analysis are settled. This Court traditionally has engaged in a balancing process, weighing "the individual's interest in liberty against the State's asserted reasons for restraining individual liberty." *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982). The inquiry involves two steps: "'a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it.'" *Washington v. Harper*, 110 S. Ct. at 1036 (quoting *Mills v. Rogers*, 457 U.S. 291, 299 (1982)) (citations omitted). Under those standards, the trial court's order cannot stand, for the State has no adequate interest to justify overriding Perry's liberty interest in refusing psychotropic medication.[6]

[6] This brief relies on a due process analysis and does not address any distinct Eighth Amendment challenge to the involuntary medication order. We note, however, that in contrast to the State's argument—"the medication is an indirect means by which a punishment that is sanctioned by the Eighth Amendment may be carried out" (Br. in Opp. 4)—this case can readily be viewed as involving an indirect means by which a punishment *prohibited* by the Eighth Amendment (execution of the incompetent) may be carried out.

A. Petitioner has a Substantial Liberty Interest in Avoiding the Unwanted Administration of Psychotropic Drugs

In *Washington v. Harper*, this Court held that a prison inmate possesses a "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." 110 S. Ct. at 1036; *see also Mills v. Rogers*, 457 U.S. at 299 n.16 (assuming existence of liberty interest); *Vitek v. Jones*, 445 U.S. 480, 493 (1980). That interest is founded on the nature of the proposed invasion as well as the individual's legitimate claim to safeguard his dignity and bodily integrity. Those factors are of heightened significance, of course, and the liberty interest in avoiding the nonconsensual injection of Haldol is especially great, when the injection sets the prisoner directly on the road to execution.[7]

Contrary to Louisiana's contention (Br. in Opp. 10), the fact that execution has been authorized through criminal proceedings does not suffice to justify the independent physical invasion of medication or to extinguish Perry's liberty interest in avoiding involuntary psychotropic medication. It is axiomatic that conviction of a crime and incarceration, while limiting an inmate's right to freedom from confinement, do not extinguish his right

[7] Perry's liberty interest is not diminished by the fact that he is incompetent to give or refuse informed consent to medical treatment. An absence of consent may have the same legal consequence whether it is the result of a competent person's refusal or an incompetent person's inability to consent. *Cf. Zinermon v. Burch*, 110 S. Ct. 975 (1990). In any event, it is difficult to conceive that any guardian, under a "substituted judgment" or "best interests" standard, would consent to medication that would lead to death.

to liberty altogether. *Vitek v. Jones*, 445 U.S. at 493-94; *Bell v. Wolfish*, 441 U.S. 520, 545 (1979); *see also DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1006 n.8 (1989). In *Harper* and elsewhere, this Court has applied that principle in the specific context of involuntary medical treatment of prisoners. *See Vitek v. Jones*, 445 U.S. at 491-94; *see also Youngberg v. Romeo*, 457 U.S. at 315-16. Here, involuntary medication has *not* been authorized as part of Perry's criminal sentence, and it is not "among those [deprivations] generally authorized by his confinement." *DeShaney*, 109 S. Ct. at 1006 n.8; *see also Vitek v. Jones*, 445 U.S. at 493 (medical confinement is "qualitatively different from the punishment characteristically suffered by a person convicted of crime"). Consequently, Perry retains an independent liberty interest in avoiding involuntary administration of psychotropic medication—an interest not extinguished by criminal conviction and sentence, and protected unless overcome by a sufficient state interest.[8]

B. The State does not have a Sufficient Interest to Override Petitioner's Liberty Interest

Before this Court, Louisiana has suggested that the order overriding petitioner's substantial liberty interest is justified by (a) a *parens patriae* interest in furthering Perry's medical interests (Br. in Opp. 4, 14-15), (b) a police power interest in protecting others against dangers caused by Perry's incompetence (*id.* at 14), and (c) a penal interest in carrying out Perry's sentence. There is, however, no basis for either a *parens patriae* or dangerousness justification in this case. The order requiring administration of Haldol must stand, if at all, on the ground that it facilitates Perry's execution. But that interest is insufficient to justify the deprivation of Perry's liberty interest that Louisiana proposes.

[8] State law recognizes a liberty interest that is at least as extensive as that protected by the Due Process Clause. *See* La. Rev. Stat. Ann. § 15:830.1 (West 1981).

1. *The Medication Order is Based Only on the State's Interest in Facilitating Capital Punishment*

Although the court below did not rely on a *parens patriae* rationale, the State here invokes such a rationale to justify medicating Perry involuntarily. Pet. App. 56; Br. in Opp. 14-15. According to the State, "the medicine is in . . . Perry's . . . best interest." Br. in Opp. 4. That remarkable claim is obviously incorrect.

Under its *parens patriae* power, a State may act to preserve and promote the welfare of those who cannot care for themselves. *See Schall v. Martin*, 467 U.S. 253, 265-66 (1984); *O'Connor v. Donaldson*, 422 U.S. 563, 574-76 (1975); *id.* at 583 (Burger, C.J., concurring).[9] As this Court observed a century ago, the *parens patriae* power is by nature "a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890); *see also Addington v. Texas*, 441 U.S. 418, 426 (1979). It strains credulity to invoke the *parens patriae* power in this case. Louisiana's efforts are aimed

[9] The term *parens patriae*, meaning "father of the country," was inherited from the English common law and traditionally referred to the King's power to act as "'the general guardian of all infants, idiots, and lunatics.'" *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972) (quoting 3 W. Blackstone, *Commentaries* *47). The King's *parens patriae* power generally was employed for the benefit of those who could not care for themselves. *Ibid.* This concept has been expanded in the United States. For example, in the antitrust area, courts have held that the State may bring a *parens patriae* suit to vindicate certain "quasi-sovereign" interests. *Id.* at 257-60. Even in its expanded version, however, the power is aimed at benefiting the persons represented by the State.

not at benefiting Perry as a ward of the State, but rather at facilitating his death to serve separate state interests. Any benefit that Haldol might confer on Perry[10] would be both fleeting and purchased at the cost of his life.[11]

Administration of psychotropic medication is thus directly contrary to Perry's medical interests. To be sure, as the APA has explained in detail in prior briefs before this Court, psychotropic medication is, properly used, a very effective form of treatment for both acute and chronic forms of psychosis. *See* Brief of Am. Psychiatric Ass'n As Amicus Curiae in *Washington v. Harper*, at 10-16. The Court in *Harper* specifically recognized the therapeutic benefits of such medicaton. 110 S. Ct. at 1041. Whether a particular treatment is in a particular patient's medical interests, however, is always a question involving consideration of benefits and risks. There may well be room for debate about that balance in other situations—as where the patient is not under any sentence of death,[12] or where the inmate is currently competent

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[10] The trial court found that Haldol improved Perry's mental functioning. Pet. App. 51, 54, 57.

[11] Conceivably, Perry might have his death sentence overturned on other grounds on collateral review. Because the sentence has been affirmed on appeal, however, such a possibility must, for present purposes, be deemed highly speculative. *See Whitmore v. Arkansas*, No. 88-7146, slip op. at 7 (U.S. Apr. 24, 1990). Similarly, in light of the trial court's finding that Haldol restores Perry to competence to be executed (Pet. App. 54, 57), this Court must take it as given that administration of Haldol would lead to competence for purposes of *Ford v. Wainwright*, and hence to execution.

[12] Most important in this regard are the cases discussing involuntary medication of persons found incompetent to stand trial. *See, e.g., United States v. Charters*, 863 F.2d 302 (4th Cir. 1988) (en banc), *cert. denied*, 110 S. Ct. 1317 (1990); *Bee v. Greaves*, 744 F.2d 1387 (10th Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985). In that situation, even when the defendant is charged with a capital offense, on one side of the balance are the benefits of medication (which may be vital to the defendant's ability to assist in his de-

and, while treatable disorders might be present, any descent into incompetence is speculative.[13] But where, as here, the patient is sentenced to death and medication would all but inexorably lead to execution, the balance determining the patient's medical interests is unmistakably clear. There can be no *parens patriae* justification for facilitating an incompetent person's death.

Like the *parens patriae* claim, the State's attempt to rely on a dangerousness rationale here is misplaced. This case plainly does not implicate the State's interest in exercising its police power to correct a condition that poses an immediate danger to other inmates or staff in the prison setting. Although the State asserts the contrary (Br. in Opp. 14), it does not cite to any evidence in the record that Perry might pose a danger to others if not medicated. There are no findings that Perry is dangerous to others in his present prison setting, and there is no other record basis for viewing the medication order as resting on such a foundation. Accordingly, the medication order in this case rests only on the State's interest in facilitating Perry's execution.

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fense) as well as the possibility of acquittal, and on the other the mere possibility of ultimate conviction and sentence to death. In view of those particular considerations, a directive of involuntary medication may be found to further the State's *parens patriae* interests by fulfilling the inmate's medical needs and other best interests. *See Whitmore v. Arkansas*, slip op. at 9-10 (noting that no litigant can "prove in advance that the judicial system will lead to any particular result in his case").

[13] The court below specifically found that without his medication, Perry would in fact lapse into incompetence. Pet. App. 54. Perry's situation is therefore different from that of other inmates under sentence of death who may be suffering from a mental illness that would appropriately be treated with medication but that, if untreated, may never lead to incompetence under *Ford v. Wainwright*. In that situation, the balance of benefits and risks associated with medication may by no means be certain, as the medication would not be (as it is for Perry) a clear but-for cause of death.

2. *Involuntary Medical Treatment is Impermissible if it is Contrary to the Patient's Medical Interests and is not Necessary to Treat a Condition that Threatens Harm to Others*

In our view, involuntary medical treatment may never constitutionally be justified if, as here, it is contrary to the patient's medical interests. That view is strongly supported by decisions of this Court and lower courts as well as by the pertinent statutes governing involuntary hospitalization and treatment of the mentally ill. More narrowly, no source of which we are aware authorizes involuntary medication, including psychotropic medication, when it is contrary to the patient's medical interests *and* it is not needed to cure a condition that poses a danger to others.[14] It is just such unprecedented authorization that Louisiana seeks here. This Court should reject the State's claim: in addition to consistent precedent and practice, compelling concerns respecting medical ethics and treatment establish that the State has no sufficient justification for overriding Perry's liberty interest.

a. This Court in *Harper* upheld a prison policy that authorized involuntary psychotropic medication only for prisoners who (1) suffer from a mental disorder *and* (2) either are gravely disabled or are a threat to themselves or others. 110 S. Ct. at 1033 & n.3. In finding the State's interest constitutionally sufficient, the Court repeatedly pointed out that involuntary medication was authorized only when a physician had found it to be "in the inmate's medical interest" *and* the patient was "dangerous to himself or others." *Id.* at 1039-40; *see also id.* at 1033, 1037 & n.8, 1039.[15] Indeed, referring to those preconditions, the Court stated that the Due Process Clause recognizes a liberty interest that "permits refusal of antipsychotic drugs unless certain preconditions are met." 110 S. Ct. at 1040.

[14] Decisions approving compulsory quarantines and vaccinations are no exception to that rule: such measures typically protect public health and are not contrary to the individual's medical interests. *See e.g., Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (compulsory vaccination); *Compagnie Francaise De Navigation A Vapeur v. State Bd. of Health*, 186 U.S. 380 (1902) (quarantine); *Morgan's Louisiana & T. R. & S.S. Co. v. Board of Health*, 118 U.S. 455 (1886) (quarantine).

Similarly, every lower court decision that has upheld involuntary administration of psychotropic medication has done so only where a *parens partiae* interest underlies the medication decision. At least one court has explicitly required this *parens patriae* interest. *See, e.g., Bee v. Greaves*, 744 F.2d at 1395. Other courts have ratified a "professional judgment" standard that presupposes that medication is based on proper medical judgment. *See, e.g., United States v. Watson*, 893 F.2d 970, 975-76, 979-82 & n.14 (8th Cir), *reh'g granted* (Apr. 20, 1990); *Dautremont v. Broadlawns Hosp.*, 827 F.2d 291, 300 (8th Cir. 1987); *Johnson v. Silvers*, 742 F.2d 823, 825 (4th Cir. 1984); *United States v. Bryant*, 670 F. Supp. 840, 842 (D. Minn. 1987). Several courts have upheld involuntary treatment noting that the treatment was in the patient's best medical interests. *See, e.g., Zaire v. Dalsheim*, 698 F. Supp. 57, 59 (S.D.N.Y. 1988) (forcible injection of diphtheria-tetanus inoculation to incoming prisoners not actionable under Eighth Amendment since its purpose was "solely to protect plaintiff and other inmates from harm"); *cf. United States v. Leatherman*, 580 F. Supp. 977, 978, 980 (D.D.C. 1983), *appeal dismissed*, 729 F.2d 863 (D.C. Cir. 1984). And a number of courts have disapproved the use of antipsychotic medication aimed solely at behavioral control or punishment in institutional settings. *See, e.g., Johnson v. Solomon*, 484 F. Supp. 278,

[15] The majority's references to this point are numerous. *See* 110 S. Ct. at 1039 ("The drugs may be administered for no purpose other than treatment . . . ."); *id.* at 1039-40 ("[T]he Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest.").

309-10 (D. Md. 1979); *Pena v. New York State Div. for Youth*, 419 F. Supp. 203, 211 (S.D.N.Y. 1976) (involuntary medication may not be used as a behavior control device and as punishment rather than "as part of an ongoing treatment program authorized and supervised by a physician"); *Nelson v. Heyne*, 355 F. Supp. 451, 455 (N.D. Ind. 1972) (invalidating use of medication "for the purpose of controlling excited behavior rather than as part of an ongoing, psycho-therapeutic program"), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). *See also Jones v. United States*, 463 U.S. 354, 385 (1983) (dissenting opinion) (Supreme Court has never approved practice of administering "psychotropic medication to control behavior" or "for reasons that have more to do with the needs of the institution than with individualized therapy").[16]

[16] Consistent with those decisions are the suggestions in several of this Court's cases that involuntary medication cannot be used for purposes of punishment. In *Vitek v. Jones*, this Court, in defining the liberty interest retained by a prisoner whom the State sought to transfer to a mental institution, recognized that a criminal conviction does not "entitle[] a State . . . to subject [a prisoner] involuntarily to institutional care in a mental hospital." 445 U.S. at 493. In *Harper*, three Justices flatly declared that "[f]orced administration of antipsychotic medication may not be used as a form of punishment." 110 S. Ct. at 1047 (Stevens, J., with Brennan and Marshall, JJ., concurring in part and dissenting in part). The majority in *Harper* did not disagree with that assertion. *See also Jones v. United States*, 463 U.S. at 373 n.4 (Brennan, J., with Marshall and Blackmun, JJ., dissenting) ("[I]t is questionable that confinement to a mental hospital would pass constitutional muster as appropriate punishment for any crime.").

Similarly, the Court in *Winston v. Lee*, 470 U.S. 753 (1985), albeit in the Fourth Amendment context, rejected a State's attempt to subject a criminal suspect to surgery in order to secure evidence. The Court relied in particular on the risk to the suspect's health presented by the surgery. *Id.* at 761.

Relevant legislative actions in this area reflect the same principles. No statute, state or federal, of which we are aware authorizes involuntary medication either specifically for purposes of facilitating execution by restoring competence or, more generally, where the medication is contrary to the patient's medical interests and unnecessary to protect others. Indeed, a Louisiana statute itself forbids medication of civilly committed mental patients for any but medical reasons. La. Rev. Stat. Ann. § 28:171(P) (West 1989) ("Medication shall not be used for nonmedical reasons such as punishment or for convenience of the staff."); *see also* Pet. 11-12. Moreover, state statutes governing civil commitment uniformly require that the patient be mentally ill and either gravely disabled or dangerous to himself or others. *See* S. Brakel, J. Parry, & B. Weiner, *The Mentally Disabled and the Law* 34-35 (3d ed. 1985); *id.* at 114-18 (table 2.6) (collecting state statutes). *See also Humphrey v. Cady*, 405 U.S. 504, 509 (1972). Civil commitment as authorized in our country is intended "to treat the individual's mental illness and protect him and society from his potential dangerousness." *Jones v. United States*, 463 U.S. at 368.[17]

b. The widespread recognition of the prohibition on the government's ability to use involuntary medication for nonmedical ends is no accident. It reflects a deep-seated social interest in preserving medical care, in actuality and in public perception, as an unambiguously beneficent healing art. At least until state legislatures clearly declare otherwise—and neither in Louisiana (*see* note 17,

[17] Louisiana's statute governing involuntary medication of mentally ill inmates reflects these same purposes. *See* La. Rev. Stat. Ann. § 15:830.1 (West 1981) (short-term involuntary medication possible only where treatment authorized by physician has been refused and physician certifies that medication is "necessary to prevent harm or injury to the inmate or to others"; longer term involuntary medication possible only upon judicial finding that inmate is incompetent and where treatment is "appropriate").

supra) nor elsewhere has a legislature authorized what the State urges here—a State's interest in departing from the familiar strictures on the use of medical treatment, and in allowing involuntary medication in order to facilitate a patient's death, cannot be deemed a sufficiently weighty one, because any such departure would threaten States' vital interests in the ethical standards and the treatment function of the medical profession.

To begin with, when the State's purpose in medicating someone involuntarily has no connection to either a *parens patriae* or dangerousness principle, the directive to medicate creates an excruciating ethical dilemma for treating physicians. *See generally* Note, *Medical Ethics and Competency to be Executed*, 96 Yale L.J. 167 (1986). Having taken the Hippocratic Oath, all physicians are duty-bound (1) to employ their treatment arts for the benefit of their patients and (2) to alleviate the patient's suffering. *See Washington v. Harper*, 110 S. Ct. at 1037 n.8 ("Unlike the dissent, we will not assume that physicians will prescribe these drugs for reasons unrelated to the medical needs of the patients; indeed, the ethics of the medical profession are to the contrary.").[18] In the *present* situation, however, those ethical norms are in conflict, for alleviation of present suffering by giving medication will lead, by restoration of competence, to death.

Though no longer explicitly enshrined in the code of medical ethics, the maxim *primum non nocere*—first, do no harm—has for centuries served as the ethical touchstone for the medical profession. Radelet & Barnard, *Treating Those Found Incompetent for Execution:*

[18] The Declaration of Hawaii, adopted in 1977 by the World Psychiatric Association in response to the misuse of psychiatric treatment in the Soviet Union, prohibits compulsory treatment unless, among other things, "it is done in the patient's best interests." *See Psychiatric Ethics* 27, 351 (S. Bloch & P. Chodoff ed. 1981).

Ethical Chaos with Only One Solution, 16 Bull. Am. Acad. Psychiatry & Law 297, 298 (1988).[19] Out of a recognition that doing harm is antithetical to the guiding spirit of medical ethics, the ethical code of the American Medical Association, as adopted and interpreted by the American Psychiatric Association, prohibits a psychiatrist from being "a participant in a legally authorized execution." APA, *The Principles of Medical Ethics: With Annotations Especially Applicable to Psychiatry* § 1, Annot. 4 (1989). *See also* Council on Ethics and Judicial Affairs, American Medical Association, *Current Opinions* § 2.06 (1989). That principle, which derives directly from the Hippocratic Oath's prohibition on administering a poison (Oath of Hippocrates, *reprinted in* A. Dyer, *Ethics and Psychiatry: Toward Professional Definition* 41 (1988)), forbids a psychiatrist personally to administer a lethal injection. APA, *Opinions of the APA Ethics Committee on the Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* § 1-C (1989). *See also* A. Dyer, *supra*, at 39-40; Finks, *Lethal Injection: An Uneasy Alliance of Law and Medicine*, 4 J. Legal Med. 383, 389-90 (1983). Administering involuntary medication in circumstances like the present is only a small step away from participating in the execution itself. *See* Ewing, *Diagnosing and Treating "Insanity" on Death Row: Legal and Ethical Perspectives*,

[19] When forensic psychiatrists testify for the State in criminal proceedings, they are not violating the maxim, because there is no treatment relationship. Instead, the psychiatrist is acting as a consultant in the adversary process, providing a professional evaluation that is frequently subject to cross-examination or to refutation by contrary evidence. *See also* APA, *The Principles of Medical Ethics: With Annotations Especially Applicable to Psychiatry* § 7, Annot. 1 (1989) (psychiatrists may serve as consultants to judicial branch); *id.* at § 4, Annot. 6 (psychiatrist conducting examination for legal competence must first fully disclose nature and purpose of examination and lack of confidentiality). By contrast, the order in this case requires psychiatrists to employ their *treatment* arts to maintain competence so that their patient may be executed.

5 Behav. Sci. & Law 175, 183 (1987). Such a role stretches medical ethics to, if not beyond, the breaking point.[20]

Physicians' ethical dilemma in giving medical treatment to facilitate capital punishment is mirrored in the resulting corruption of their treatment function. Physicians, and especially psychiatrists, require the trust of their patients. A treating psychiatrist must build a relationship with the patient to encourage communication of symptoms and to allow monitoring of the effects of medication. The psychiatrist must encourage the patient to speak openly to facilitate individual and group therapy. There can be few more certain ways of jeopardizing these necessary treatment functions than for the psychiatrist to become an instrument of punishment. *See* Radelet & Barnard, *Ethics and the Psychiatric Determination of Competency to be Executed*, 14 Bull. Am. Acad. Psychiatry & Law 37, 49 (1986).

This concern is at its greatest with respect to patients in prison. Prisoners already have reasons to be suspicious of psychiatrists, because psychiatrists in an evaluative role often testify against prisoners in competency, insanity, and death penalty proceedings. If psychiatrists are now required to do harm to prisoners in their treatment role, the ability of all physicians to maintain an effective patient-physician relationship with prisoners will be significantly impaired.

Prisons and prisoners generally, and death row inmates particularly, can ill afford to be deprived of effective psychiatric care—either by the compromising of the physician-patient relationship or by psychiatrists' avoidance of death row prisoners for fear of being put in an ethically unconscionable position. The psychiatric needs

[20] Indeed, one psychiatrist in this case stated on the record that his ethical doubts prevented him from treating Perry. Pet. App. 80, 87 (testimony of Dr. Cox).

of death row inmates are acute.[21] Despite an unquestioned need, the provision of psychiatric care in the Nation's prisons and jails leaves much to be desired. Kaufman, *The Violation of Psychiatric Standards of Care in Prisons*, 137 Am. J. Psychiatry 566 (1980); Valdiserri, *Psychiatry Behind Bars*, 12 Bull. Am. Acad. Psychiatry & Law 93, 93, 97 (1984); *see also* APA, *Task Force Report 29: Psychiatric Services in Jails and Prisons* (Mar. 1989). Numerous factors already operate to discourage psychiatrists from working with prison populations, including poor working conditions, the potential for conflicts with prison officials, the diminished emphasis on rehabilitation, and problems of prestige and remuneration. APA, *Task Force Report 29*, at 2; Valdiserri, *supra*, at 93-94. Allowing involuntary medication to be employed for the purposes of facilitating capital punishment would exacerbate those problems.[22] The result would be to under-

[21] Like Michael Perry, many inmates arrive with a long history of mental illness behind them. *See, e.g.*, Lewis, *et al., Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 Am. J. Psychiatry 838, 840-41 (1986). Once on death row, inmates face unique psychological stresses. "[P]ossibly the most stressful of all human experiences is the anticipation of death at a specific moment in time and in a known manner." Gallemore & Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 Am. J. Psychiatry 167, 167 (Aug. 1972); *see also* Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 Law & Psychology Rev. 141, 176-81 (1979). Available studies suggest that this stress causes a significant proportion of death row inmates to deteriorate psychologically. *See* Gallemore & Panton, *supra*, at 168, 169; Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death By Execution*, 119 Am. J. Psychiatry 393 (Nov. 1962).

[22] The reaction of Florida mental health professionals to treating Gary Alvord, an inmate who was judged incompetent for execution, is telling. Because of the ethical dilemmas they faced, all of the staff members who worked with Alvord said that they would not again become involved in treating an inmate judged incompetent to be executed. Radelet & Barnard, *supra*, 16 Bull. Am. Acad. Psychiatry & Law at 303-04.

mine important state interests without any evidence that state legislatures are ready to sacrifice them.

II. AFTER REMAND, THE STATE MUST COMMUTE PETITIONER'S SENTENCE TO LIFE IMPRISONMENT AND PROVIDE HIM WITH MEDICATION FOR TREATMENT PURPOSES

If this Court holds that a State cannot administer antipsychotic medication to a nonconsenting prisoner in order to facilitate his execution, Louisiana will face a choice. First, it could warehouse petitioner in an unmedicated state in the hope that someday he will regain competence spontaneously and thus become eligible for execution. Second, it could administer antipsychotic medication to alleviate petitioner's suffering, which means forgoing imposition of the death penalty. We submit that only the second option is constitutionally permissible.

The Eighth Amendment confers on prisoners a right to adequate medical treatment for known medical problems. *See Estelle v. Gamble*, 429 U.S. at 104; *see also DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. at 1005. That right clearly extends to the provision of adequate psychiatric care.[23] Unquestionably, for a State deliberately to allow a prisoner to languish with a treatable psychosis would violate the Eighth Amendment principle established in *Estelle v. Gamble*. *See* C. Beers, *A Mind That Found Itself: An Autobiography* (5th ed. 1921) (describing experience of severe mental illness); *see also* M. Bowers, *Retreat From Sanity: The Structure of Emerging Psychosis* 33-40

[23] *See, e.g., United States v. Kidder*, 869 F.2d 1328, 1330 & n.1 (9th Cir. 1989); *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984); *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982); *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. Unit A 1981) (per curiam); *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 763 (3d Cir. 1979); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977); *Guglielmoni v. Alexander*, 583 F. Supp. 821, 826 (D. Conn. 1984).

(1974) (quoting from accounts of experience of schizophrenia); S. Sheehan, *Is There No Place on Earth for Me?* 59-68 (1982) (describing behavior of acutely schizophrenic patient).

There is little need to belabor this obvious Eighth Amendment principle, because Louisiana itself concedes that "to refuse Haldol medication to Perry and let him languish in a world filled with delusions and hallucinations . . . would violate Perry's rights under the Eighth Amendment." Br. in Opp. 15. But even if a State could, under some circumstances, justify withholding medical care needed for a known, serious medical problem, the State cannot plausibly do so here. Only two interests might be advanced to support withholding needed medical care—the State's interest in awaiting a spontaneous restoration of competence so that the sentence of death can be carried out; and the State's interest in combating the feigning of incompetence. Neither interest, however, stands up to analysis.

a. The possibility of spontaneous recovery can be of no help to Louisiana in this case. After hearing the expert testimony, the trial court found as a factual matter that Perry was "competent *only* while maintained on psychotropic medication in the form of Haldol." Pet. App. 54 (emphasis added). The State has not challenged that finding, and there is no record basis for any contrary suggestion that Perry might become competent without medication. *See* Br. in Opp. viii.

More generally, a State has at best only a slight interest in withholding medical care in the hope that a prisoner will spontaneously remit at some future time, thereby removing the barrier to his execution. For many psychotic patients, it is highly speculative that spontaneous recovery will ever occur. Even if *some* improvement does occur wthout medical intervention, moreover, that improvement may not be sufficient to achieve competence to be executed. And even if competence is achieved, a

relapse may occur before the State's execution machinery can be properly deployed. In any event, while the State waits for a sufficient spontaneous recovery, the prisoner continues to suffer from a psychosis, perhaps for years or even forever.

b. Nor can any state interest in preventing prisoners from feigning incompetence to be executed justify a deliberate refusal to give needed treatment to relieve the suffering caused by psychosis. Again, in *this* case, a court has already determined, after a series of adversary hearings, that petitioner is incompetent to be executed without his medication—a conclusion not challenged by the State. There is thus no issue of feigning here.

More generally, the State's interest in preventing feigning by *other* prisoners can be successfully furthered through the use of (1) clinical screening techniques and (2) legal burdens of proof. The clinical literature demonstrates the difficulty of successful feigning.[24] Certain conditions, notably severe mental retardation, are extremely difficult to feign because of the obvious possibility of verifying the condition by reference to an individual's school or vocational records. Resnick, *The Detection of Malingered Mental Illness*, 2 Behav. Sci. & Law 21, 29 (1984). For other conditions, psychiatrists now have at their disposal a range of methods shown by empirical studies to be effective in the detection of malingering. *See generally* Rogers, "Current Status of Clinical Methods," in *Clinical Assessment of Malingering and Deception* 293, 294-95 (R. Rogers ed. 1988) (summarizing usefulness of wide range of clinical and psychometric methods).[25] A large and growing body of

[24] In recent years, increasing attention has been focused on the problem of detecting malingering. *See, e.g., Clinical Assessment of Malingering and Deception* (R. Rogers ed. 1988); *Malingering and Deception: An Update*, 8 Behav. Sci. & Law 1-104 (1990) (Special issue).

[25] For example, malingering can be detected successfully with the aid of certain objective psychological instruments, principally

knowledge concerning the signs of malingering is now available to clinicians.[26] Special interview techniques may be helpful as well.[27] The psychiatrist's standard diagnos-

the Minnesota Multiphasic Personality Index (MMPI). *See* Rogers, *Towards an Empirical Model of Malingering and Deception*, 2 Behav. Sci. & Law 93, 99-101 (1984) (summarizing MMPI research). *See generally* Greene, "Assessment of Malingering and Defensiveness by Objective Personality Inventories," in *Clinical Assessment of Malingering and Deception* 123, 138-50 (R. Rogers ed. 1988) (explaining MMPI scales and their effectiveness and summarizing research). Newly developed tests have also been used with promising results. *See* Bagby, Gillis & Dickens, *Detection of Dissimulation with the New Generation of Objective Personality Measures*, 8 Behav. Sci. & Law 93 (1990) (Basic Personality Inventory and the Millon Clinical Multiaxial Inventory-II). Use of a combination of different objective tests including the MMPI may be especially useful. Schretlen & Arkowitz, *A Psychological Test Battery to Detect Prison Inmates who Fake Insanity or Mental Retardation*, 8 Behav. Sci. & Law 75 (1990).

[26] Researchers have documented and catalogued common clinical indicators such as the malingerer's tendency to (1) exaggerate the severity of symptoms, (2) display symptoms that are rare or inconsistent with a diagnostic category, and (3) provide virtually no random responses or "self-damaging" statements. Rogers, *supra*, 2 Behav. Sci. & Law at 94-95, 106; Resnick, *supra*, 2 Behav. Sci. & Law at 31-32 (summarizing sixteen common clues to malingered psychoses). More, too, is known about the usual experience of persons with particular mental illnesses or particular symptoms. *See* Resnick, "Malingered Psychosis," in *Clinical Assessment of Malingering and Deception* 34 (R. Rogers ed. 1988). For example, several researchers have studied the characteristics of auditory hallucinations in schizophrenic patients, yielding a body of clinical knowledge against which the symptoms of suspected malingerers can be judged. *Id.* at 37-39; Resnick, *supra*, 2 Behav. Sci. & Law at 27-28. Nonverbal indicators such as facial expression and movement of limbs can also be used successfully by clinicians to detect feigners. Rogers, *supra*, 2 Behav. Sci. & Law at 101-05.

[27] *See* Rogers, "Structured Interviews and Dissimulation," in *Clinical Assessment of Malingering and Deception* 250 (R. Rogers ed. 1988); *see also* Rogers, Gillis & Bagby, *The SIRS as a Measure of Malingering: A Validation Study with a Correctional Sample*, 8 Behav. Sci. & Law 85 (1990) (structured interview technique successfully used on prison population).

tic handbook itself provides useful guidance in identifying fakery. *See* APA, *Diagnostic and Statistical Manual of Mental Disorders* 360 (3d rev. ed. 1987).[28]

In addition to psychiatric evaluations, legal procedures for raising incompetence claims can and do operate to thwart a death row inmate's ability to feign incompetence. As Justice Powell observed in his *Ford* concurrence, once convicted and sentenced, an inmate must overcome a presumption of sanity. 477 U.S. at 425-26. Louisiana law, for example, requires a prisoner to bear the burden of demonstrating "reasonable ground[s]" to believe that he is incompetent to be executed in order to get a sanity commission appointed in the first place. *State v. Perry*, 502 So.2d at 564.[29] A prisoner such as Perry also bears a second burden of persuasion—by a preponderance of the evidence—on the ultimate issue of incompetence. *Ibid.*

The foregoing clinical and legal safeguards, taken together, greatly reduce the danger that a prisoner will be able to feign a mental condition that constitutes incompetence, at least under the standards suggested by Justice Powell in *Ford*. And, of course, additional procedures could be adopted if experience proves them necessary to

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[28] Of course, a prisoner's incentive to feign is at its acme in the context of determining competence to be executed. Clinicians, however, will be well aware of that incentive; indeed, psychiatrists are specifically advised by the standard diagnostic handbook (at 360) to consider the clinico-legal context in evaluating signs of malingering. Moreover, in this unique context, special measures to uncover malingering may be employed, such as a particularly close review of past psychiatric records, including a comparison of symptoms past and present. *See* Lewis, *et al.*, *supra*, 143 Am. J. Psychiatry at 842-44 (clinical findings verified by examining objective evidence such as hospital records, using psychological and educational tests, and interviewing parents).

[29] Here, Perry did just that. *See* Pet. App. 69. *Compare Caldwell v. Tennessee*, 1990 Tenn. Crim. App. LEXIS 235, at *19-21 (Tenn. Ct. Crim. App. Mar. 21, 1990) (upholding refusal to appoint sanity commission).

provide greater assurance of accuracy. At present, however, it would be groundless speculation to conclude that feigning is effectively incapable of detection and thereby permit the State to forgo providing appropriate medical care to an inmate.

In short, a State has no real interest in allowing an incompetent inmate like Perry to suffer for lack of needed medication. The Eighth Amendment thus requires the State to administer to petitioner whatever medication is appropriate for treatment purposes and to commute his sentence to life imprisonment.[30] This course will resolve the supposed "Catch-22 situation" posited by the State (Br. in Opp. 14)—*i.e.*, that the State is barred from involuntarily medicating petitioner but at the same time is required by the Eighth Amendment to provide psychiatric care. The State can meet its Eighth Amendment obligation by medicating petitioner to promote a true *parens patriae* interest in serving his medical needs; it simply cannot medicate petitioner solely for purposes of capital punishment.[31]

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[30] This solution has been mandated by statute in Maryland. There, once an inmate is found incompetent to be executed, his sentence is automatically commuted to life imprisonment. Md. Ann. Code art. 27, § 75A(d)(3) (1987 Repl. Vol.). In addition, commutation for incompetent death row inmates was the uniform practice in England between the early 1840s and 1965, when England abolished the death penalty. 1 N. Walker, *Crime and Insanity in England: The Historical Perspective* 205, 216 (1967); Feltham, *The Common Law and the Execution of Insane Criminals*, 4 Melb. U.L. Rev. 434, 475 (1964); *see also* R. Duff, *Trials and Punishments* 15 (1986).

[31] In light of the ethical dilemmas, psychiatrists in this country who have worked with the few inmates found incompetent to be executed, and other commentators, have also endorsed this approach. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 Fla. St. U.L. Rev. 35, 91 (1986) (Florida State Hospital Human Rights Committee's recommended commutation rule after dealing with dilemmas posed by treating Gary Alvord); Note, *supra*, 96 Yale L.J. at 186; Radelet & Barnard, *supra*, 16 Bull. Am. Acad. Psychiatry & Law at 301-06 (describing Alvord case at length).

CONCLUSION

The judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

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